Filed 6/29/09 In re R.N. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re R.N., a Person Coming Under the Juvenile Court Law.	B209263
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.N., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK60586)

Appeal from an order of the Superior Court of Los Angeles County. Donna Levin, Juvenile Court Referee. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

* * * * * *

J.N. (father) appeals from the dependency court's termination of his parental rights and related orders regarding his three children. We affirm.

FACTS AND PROCEEDINGS

Mother and appellant father have three children: R-1, born in 1996; J-1, born in 2001; and R-2, born in January 2005. In January 2005, the child welfare agency of Alameda County, where mother, father, and children lived, filed a petition under section 300 of the Welfare and Institutions Code.[1] The petition alleged mother, who suffered from epilepsy, could not care for the children because she did not take her prescribed medication to control her frequent seizures. Moreover, the petition alleged, mother appeared not to be bonding with newborn R-2 because she did not hold or feed the infant. The Alameda authorities placed newborn R-2 in foster care, but did not detain the two older children. In February 2005, mother and father submitted to the Alameda petition based on the report of an Alameda County social worker, and the county returned R-2 to mother and father's custody.

In June 2005, mother moved to a domestic violence shelter. Alameda County removed the children from father's custody and placed them with mother in the shelter. Later that summer, mother and children relocated to Los Angeles, and mother moved in with maternal grandmother. Because of mother's continuing inability to care for the children due to her uncontrolled epilepsy, the children were, with mother's consent, placed with a couple who were to become their long-term foster family. Following the children's placement with the foster family in Los Angeles, Alameda County paid for father's weekend bus trips to Los Angeles to visit the children. In August 2005, Alameda County transferred jurisdiction over the dependency proceeding to the Los Angeles Superior Court.

In November 2005, maternal grandmother ejected mother from her home because mother had assaulted grandmother and another family member. Mother moved back to

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[1] All further undesignated section references are to the Welfare and Institutions Code.

Alameda County to live with father and asked that the dependency proceedings return to Alameda County. In December 2005, the Los Angeles Superior Court-directed respondent Department of Children and Family Services (DCFS) to re-place the children in Alameda County to facilitate mother and father's visitation with them. Los Angeles County returned jurisdiction over the children to Alameda County, but the children remained placed in Los Angeles, with mother enjoying unmonitored visitation, but father permitted only monitored visitation. During this period, mother and father visited their children one weekend day per month.

In April 2006, the children returned to Alameda County. The next month, mother and father returned to Los Angeles in apparent agreement that the best place for the children was with their foster parents. Jurisdiction in the proceedings having returned to Los Angeles County, the dependency court ordered DCFS to look into whether father could care for the children, provided mother did not live in the same home with them. The court ordered father to have unmonitored day visits with the children, but, on July 9, 2007, father was arrested and incarcerated in Los Angeles County Jail, where he remained until March 2008, for an outstanding warrant involving a drug offense unrelated to these dependency proceedings.

In September 2007, the court adjudicated DCFS's subsequent petition (§ 342) against parents alleging family violence. It sustained the allegations against mother, stating, "[I]t's clear to me that the mother is the one that has the big problem with respect to the violence towards the children." The court struck all allegations against father as unsustained and ordered DCFS to provide family reunification services to father as an incarcerated parent. At the October 2007 disposition hearing, the court denied parents additional reunification services, but directed DCFS to assist the children in visiting father while he was in jail. Although counsel for father and for the children stated their clients' desires that father regain custody of the children upon his release from jail, the court ordered DCFS to find suitable placement for the children with any relative other than parents.

Father was released from jail on March 5, 2008. Sometime earlier, he had told maternal relatives he would flee with the children to Mexico if the opportunity arose. Accordingly, shortly after father regained his freedom, DCFS filed a petition under section 388. The petition requested that the court restrict father's previously liberal unmonitored visits to weekly monitored visits. Father denied he had threatened to abscond with the children to Mexico, but he acknowledged that the children appeared to prefer that their visitation with him be monitored. In April 2008, the court granted DCFS's petition, and limited father to one two-hour visit, or two one-hour visits, each week.

On July 2, 2008, father filed a petition under section 388 claiming changed circumstances. He alleged he was no longer living with mother and had established a stable residence. Requesting that the court reinstate reunification services for him and the children, he also asked the court to return his children to his custody and care, or, alternatively, permit liberalized visitation, including unmonitored day visits and overnight stays. The court summarily denied the petition without a hearing because the petition did not show new circumstances that established it would be in the children's best interests to change the court's orders. The next month, the court terminated father's parental rights. This appeal followed.

DISCUSSION

A. *Denial of Additional Reunification Services*

At the October 2007 dispositional hearing for the sustained subsequent petition involving family violence, the court denied additional reunification services for father. One reason the court cited was the statutory time for reunification services had ended. (See § 361.5 [different time limits for reunification services depending on minor's age].) Father contends the court abused its discretion in not continuing the dispositional hearing to allow him additional reunification services. Section 352 permits the dependency court to continue any hearing "provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give

substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a).)

Continuances are discouraged. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1635; *In re Axsana S.* (2000) 78 Cal.App.4th 262, 272, disapproved on another point by *In re Jesusa V.* (2004) 32 Cal.4th 588, 624, fn. 12.) Moreover, and more to the point, father did not request a continuance of the dispositional hearing even though section 352 requires that a party seeking a continuance file a written motion at least two days before the hearing, unless the court for good cause entertains an oral request. (§ 352, subd. (a).) Father cites no authority that he can complain on appeal that the trial court did not grant him a continuance that he did not request.

Father contends the court would have granted him additional reunification services -- which necessarily would have entailed a continuance of the disposition hearing -- if it had believed it had the discretion to do so. According to father, the court believed an absolute time limit barred any further reunification services. The court may extend reunification services past their statutory limits, but only in "exceptional circumstances." (*In re N.M.* (2003) 108 Cal.App.4th 845, 855.) *In re N.M.* suggests exceptional circumstances are obstacles to reunification beyond a parent's control. Two examples the *N.M.* court cited were a parent being hospitalized for all but five months of the reunification period, and the failure of dependency authorities to offer or implement a reunification plan. (*Id.* at p. 856.)

Father's reading of the court's reasons for denying additional reunification services is stingy. The court indeed believed additional services were time-barred, but that bar was only one reason the court did not order additional services. The court announced, "[N]o reunification services shall be granted to either parent, extension of reunification services, because . . . time limits have expired. I want to make it clear. It doesn't matter whether I *use the other code section* or I use it on time. He cannot get it." (Italics added.) The juvenile court's statement cannot be fairly read as indicating the court was unaware of the "exceptional circumstances" exception to the 18-month review

period. It is equally fair to read the comments as an indication that father had not demonstrated that exceptional circumstances existed in this case to justify an extension of the statutory time. In light of father's failure to show exceptional circumstances, we will not read the trial court's statement as an implicit admission that it did not know the discretion the court lawfully possessed. Finally, father does not address the court's second reason -- "the other code section" -- for denying him additional reunification services, and thus does not show the court erred.[2]

DCFS notes the court set the section 366.26 permanency planning hearing at the dispositional hearing. Appeal from an order setting a 366.26 hearing is limited. (§ 366.26, subd. (*l*)(1).) A parent who objects to setting the hearing must file a petition for writ relief; failure to seek writ relief bars a parent from challenging on appeal the order setting the hearing and related orders. If, however, the trial court fails to advise the parent orally or in writing of the need to file a writ petition, a parent may challenge the order on appeal. (§ 366.26, subd. (*l*)(3)(A).)

It is undisputed that the court did not orally advise father that seeking writ relief was a precondition to challenging on appeal the order setting the permanency planning hearing. DCFS and father dispute, however, whether he received proper written notification. The clerk of the court mailed written notice of the writ requirement to father, who at the time of the dispositional hearing was in county jail in Saugus. The clerk misidentified the jail's location, however, addressing the envelope to the nonexistent city of *D*augus and omitting the zip code. DCFS asserts the post office very likely overlooked the clerk's one-letter typographical error and delivered the letter to the county jail in Saugus. In an abundance of caution, however, we decline to make such an assumption. Instead, we apply the rule found in cases such as *Jennifer T. v. Superior*

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[2] The reporter's transcript indicates the code section the court had in mind was section 361.5, subdivision (b)(3). That section states the court need not order reunification services when a child who has previously been adjudicated a dependent suffers additional abuse.

Court (2007) 159 Cal.App.4th 254, 259-260 and elect to treat father's appeal from the order setting the permanency planning hearing as a petition for a writ of mandate.

B. *Removal of Children from Father's Custody*

The court found father was a nonoffending parent. Nevertheless, because he was incarcerated and could not care for his children, the court removed them from his custody and terminated his parental rights. Father contends the court erred because no grounds exist for a dependency court to remove a child from an incarcerated parent's control if the parent can arrange for the child's care during the parent's incarceration. (*In re S. D.* (2002) 99 Cal.App.4th 1068, 1077.) Father additionally contends the court was obligated to actually inquire whether he could make arrangements for the children's care while he was in jail. According to father, the court's failure to inquire requires reversal of the court's order terminating his parental rights.

In support, father cites *In re Isayah C.* (2004) 118 Cal.App.4th 684. Father reads too much into that decision, however, because it establishes that the court need only find the parent "'cannot arrange for the care of the minor'" in order to exercise jurisdiction (*id*. at p. 695); the decision does not discuss whether inquiry by the court must precede any such finding. (Accord, *In re V.F.* (2007) 157 Cal.App.4th 962, 969, fn. 5 [child welfare agency must show with clear and convincing evidence that incarcerated parent cannot arrange for the child's care]; see also § 300, subd. (g); § 361, subd. (c)(5).) The record shows the court did not ride roughshod over father's interest in his children, but was instead mindful of his parental rights. Father told DCFS he wanted the children to remain with their foster family while he was in jail. At the disposition hearing, father's counsel asked the court to order long-term foster care with the children's foster family until father's release from jail. The court asked counsel if continued placement with the foster family was father's only proposal for the children's care. Counsel said "yes." Father's election to consign to foster parents care of his children is not "arranging" for their care; it is instead delegating to others the cost, burden, and responsibility for rearing them. Here, it was DCFS and the court that arranged for the children's care.

Comparison with *In re Athena P.* (2002) 103 Cal.App.4th 617 is instructive. There, a mother left her baby with her parents. She did not, however, give her parents legal custody (although she did unsuccessfully try to prepare the documents to give them legal guardianship.) Consequently, her parents had custody in fact, but not in law. (*Id.* at p. 629.) For example, the *Athena P.* court noted her parents lacked authority to arrange for the newborn's well-baby care and vaccinations. They would have no authority when the time came in the future to enroll her in day care, preschool, or school. Indeed, were the child to wander away when she was older, they would have been unable to prove they were entitled to have the youngster returned to them. (*Id.* at pp. 629-630.) *In re Athena P.* illustrates that arranging for a child's care requires more than letting others do the work. It involves setting in place the conditions necessary for the caretaker to assume the parental role while the parent is away from the child. Like the mother in *Athena P.*, father cannot be said to have arranged for his children's care.

C. *Denial of Section 338 Petition*

In July 2008, father filed a petition under section 388. That statute permits a parent to ask the dependency court to modify an existing order based on changed circumstances when modification is in the child's best interest. Section 388, subdivision (a) states:

> "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall be verified and . . shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order . . . ."

Father's section 388 petition requested reinstatement of family reunification services and the children's return to his custody and care. The petition alleged circumstances had changed in that he was employed, he had found suitable housing for the children and himself, and he no longer lived with mother, who was the offending parent. The court found, however, that all but one of the purported changes predated the

court's order denying additional reunification services; the only new circumstance, the court noted, was father's finding housing in a garage converted to living quarters with one bedroom. The court summarily denied the petition without a hearing.

Father contends the court erred in not granting a hearing on his petition. A parent is entitled to a hearing on his section 388 petition if the petition's allegations establish a prima facie case that, among other things, the requested modification to the court's existing orders is in the child's best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) The trial court is obligated to construe the petition liberally. (Cal. Rules of Court, rule 5.600, subd. (h).) We review the trial court's ruling for abuse of discretion. (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 419.)

Father's petition was only conclusory in its allegation that extending additional reunification services was in his children's best interests. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 [conclusory allegations are insufficient].) He alleged he would provide for all their needs. His petition stated: "The children will have a loving and stable home with their father, who is committed to providing care, love, attention, educational and medical needs, etc., for all his children." His petition's allegations did not, however, address the disruption to the children's three-plus year relationship with their foster parents. As *In re Angel B.* (2002) 97 Cal.App.4th 454, 464 explained:

> "[A] primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. [Citations.] That need often will dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child. [Citation.] Thus, one moving for a change of placement bears the burden of proof to show, by a preponderance of the evidence that there is new evidence or that there are changed circumstances that may mean a change of placement is in the best interest of the child. [Citation.] [¶] This is a difficult burden to meet in many cases, and particularly so when, as here, reunification services have been terminated."

By not addressing the harm the children would endure in being pulled from their long-term foster home, father's petition did not state a prima facie case that providing

additional reunification services and returning the children to him would be in their best interests no matter how much he would endeavor to provide for their every need. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 [parent seeking modification of order bears the burden of showing change is in child's best interest].) The court therefore did not abuse its discretion in denying the petition without a hearing.

D. *Statutory Exception Did Not Apply to Termination of Parental Rights*

Father contends the court erred in terminating his parental rights and placing his children for adoption. Adoption is the preferred permanent plan for dependent children who do not reunite with their parents. (*In re Celine R.* (2003) 31 Cal.4th 45, 49, 52-53; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 228; *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.) The Legislature has created an exception to adoption, however, when termination of parental rights would harm a child who has an ongoing parental-child relationship with a noncustodial parent. (§ 366.26, subd. (c)(1)(B)(i)[3]; *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467.) The exception applies when the benefits to the child from continuing the relationship outweigh the price the child will pay from losing a prospective adoptive family's permanency and stability. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Father, who bears the burden of proving the exception's application, contends the exception applies here. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Autumn H.*, at p. 574; *In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.)

The exception presupposes regular contact between parent and child. It also requires the parent to play a parental role in the child's life. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) A parental role means more than the loving attachment that commonly arises between

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[3] The statutory exception applies when "[t]he court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B).)

children and the adults who take care of them, and the child must benefit from more than the good feelings that typically arise from warm interaction between a child and adult. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81; *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466; *In re Andrea R.*, at pp. 1108-1109.) It is instead the type of relationship that grows from nearly daily contact when the parent shoulders the child-rearing tasks of "'day-to-day interaction, companionship and shared experiences.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, quoting *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51; *In re Beatrice M.*, at p. 1420.)

Father contends the recent decision of *In re S.B.* (2008) 164 Cal.App.4th 289 has changed the law. He asserts *In re S.B.* relieves him of needing to show the children's primary attachment was to him and that he had daily contact with them. *In re S.B.* contains language suggesting a relaxing of what a parent must show for the exception to apply, but father takes that language out of context because he overlooks the difference between the parent-child relationship of *In re S.B.* and his relationship with his children here. The strong bond in *S.B.* between child and parent, who temporarily lost custody because of drug addiction, sustained the parent-child relationship through their physical separation. *In re S.B.* described the relationship as follows:

> "[Father] was S.B.'s primary caregiver for three years[] . . . [during which father was observed] parenting S.B. in a patient and loving manner. When S.B. was removed from his care, [father] immediately recognized that his drug use was untenable, started services, maintained his sobriety, sought medical and psychological services and maintained consistent and regular visitation with S.B. He complied with 'every aspect' of his case plan. [¶] For the first year after she was removed from parental custody, S.B. continued to display a strong attachment to [father]. She was unhappy when visits ended and tried to leave with [father] when the visits were over. [Father] was sensitive to S.B.'s needs. [A social worker] noted, '[Father] consistently puts his [daughter's] needs and safety before his own.' S.B. responded to [father's] attention. During one visit, S.B. 'sat on [father's] lap . . . [and] proudly showed off the pink tennis shoes he had bought her.' The record clearly establishes S.B. initiated physical contact with [father]. Dr. Kelin observed that S.B. 'ran into [father's] arms, again getting her father to pick her up.' [Father] and S.B. shared an affectionate relationship. S.B. 'nestle[d] up to [father's] neck' and 'whispered and joked with him.' The record also shows

> S.B. loved [father] and wanted their relationship to continue. S.B. whispered to her father, 'I love you.' As [father] started to leave, S.B. stated, 'I'll miss you,' and then she gave him another hug. S.B. spontaneously said, 'I wish I lived with you and Mommy and Nana.' [¶] According to the 1973 work of psychoanalytic theory central to *Autumn H.*, a child could not develop such a significant attachment to a parent without the parent's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. As we recognized in *Autumn H.*, this type of relationship typically arises from day-to-day interaction, companionship and shared experiences, *and may be continued or developed by consistent and regular visitation* after the child has been removed from parental custody. [Citations.] The record here fully supports the conclusion [father] continued the significant parent-child relationship *despite* the lack of day-to-day contact with S.B. after she was removed from his care." (*Id.* at pp. 298-299, original italics, some brackets in original.)

Father's relationship with his children is different from the relationship in *In re S.B.* Father is, the court found, akin to a "loving uncle" in the children's lives. The children enjoyed visiting with him. He brought them gifts of food and birthday presents when they saw each other, and they greeted him with hugs and kisses. During their time together they played soccer and they called him "Daddy" or "Papa," in contrast to their addressing (at least in the case of the oldest child) their foster parents by their first names.

Nevertheless, despite the warmth of their interaction, father did not play a parental role in his children's lives. The children enjoyed visiting with him, but his departure when the visits ended did not make them sad, unlike the minor in *In re S.B.* And in other respects as well, he did not fill the role of a parent. For example, he did not attend the children's parent-teacher conferences. He did not know the names of his children's teachers or the names of their schools. He did not accompany them to any of their doctor's appointments. And, in fact, he did not even know the birth date of his oldest child, who, significantly, wanted to be adopted. Father cites no substantial evidence that the court was ungenerous in describing his relationship with his children as similar to that of a loving uncle, nor does father cite substantial evidence showing his relationship was more than what the court described. Accordingly, he fails to show the court erred in not applying the exception to termination of parental rights.

DISPOSITION

The court's order terminating father's parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.